Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ------

CHARLES R. GODDARD, JANETTA H. GODDARD LOVE, JOSEPH H. MILLS, ROBERT W. MILLS, AND EDWARD V. MILLS,

Petitioners,

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY, A CORPORATION, AND THE UNITED STATES

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, Charles R. Goddard, Janetta H. Goddard Love, Joseph H. Mills, Robert W. Mills, and Edward V. Mills, acting by and through their attorneys, Daniel Partridge, III, and Franklin P. Gould, respectfully pray for a Writ of Certiorari directed to the United States Court of Appeals for the District of Columbia Circuit to review the decision and judgments of the Court dated January 12, 1961, in the consolidated cases of Charles R. Goddard, et al. v. District of Columbia Redevelopment Land Agency, a corporation, and Charles R. Goddard, et al.

v. The United States, numbered 15,868 and 15,869 in said Court.

OPINION BELOW

There were no opinions of the District Court preceding the orders dismissing the two Complaints (one against each Defendant, J.A. 8 and 14) for lack of jurisdiction. The opinion of the Court of Appeals (Appendix I) is not yet reported.

JURISDICTION

The opinion and judgment of the Court of Appeals was rendered and entered January 12, 1961 (Appendix I. and R. 23). Petition for rehearing was denied by orders dated February 10, 1961 (R. 34 and 35). The jurisdiction of this Court is invoked under T. 28 U.S. Code, Sec. 1254(1).

QUESTIONS PRESENTED

I. Did the District Court have jurisdiction over a complaint against the District of Columbia Redevelopment Land Agency for damages to property caused by its misrepresentations, its undue delay of the institution and prosecution of condemnation proceedings, and its negligence in taking procedures which increased blighting factors in the neighborhood in which the property was located, when those actions were taken for the purpose of acquiring the properties for less than the just compensation provided for in the Constitution?

(a) Was any sovereign immunity of the Agency waived by the provisions of the Federal Act of its creation authorizing it to deal in property and to sue and be sued?

(b) Was jurisdiction taken away by the provisions of the Federal Tort Claims Act (Sec. 2679) to the effect that authority to sue and be sued should not

be construed to authorize suits on claims "cognizable" under another section (1346b) when still another section (2680) provided that the Act should not apply to claims based upon the failure to exercise or perform a discretionary function and to claims arising out of misrepresentation or deceit?

II. Did the District Court have jurisdiction over a complaint against the United States under the Federal Tort Claims Act complaining of the same actions and negligence by employees of the Agency as employees of the United States?

III. Was it inconsistent to dismiss the Complaint against the Agency on the grounds that the action was cognizable under the Federal Tort Claims Act and to dismiss an action against the United States under that same Act?

IV. Some of the provisions of the District of Columbia Redevelopment Act require a taking of property by the Agency when the boundaries of a project area are fixed, under a condemnation procedure requiring the taking of title after the condemnation petition is filed, the valuation of the property as of the time of taking, and an inspection of the property thereafter by the Condemnation Jurors. Did this procedure violate the due-process and just-compensation clauses of the Constitution when coupled with actions of the Agency in unduly delaying the condemnation procedures and taking other proceedings to increase the blighting factors in the neighborhood for the purpose of acquiring the property for less than just compensation?

(a) Would a Condemnation Jury be prejudiced in fixing the fair value of real property in an area, by the labeling of that area as a blighted or slum area, an

increase of the blighting factors in that area, and a deterioration of the appearance of the neighborhood?

V. Did the Motion to Dismiss the Complaint against the United States for tortious actions of its employees involving a discretion admit the implication that those actions were at the operational level?

VI. Did the Motion to Dismiss that Complaint admit the implication that some of the duties violated were ministerial?

VII. Did the District Court err in dismissing the Complaint against the Agency without requiring the filing of an Answer to Interrogatories and allowing Plaintiffs to amend in the light of the Answers to those Interrogatories?

VIII. Did the Act of Congress creating the Agency make it a Municipal Corporation liable for the actions charged against it?

(a) Were those actions done in the exercise of a proprietary function?

(b) If such function was governmental, should the distinction between governmental and proprietary functions be abolished as artificial and obsolete?

IX. Is a Federal Corporation immune from liability for actions of its employees even though they violated the Constitution purposely to enrich that Corporation?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

CONSTITUTION (FIFTH AMENDMENT), ART. XIV. SEC. 1. U. S. CODE XLVII:

"No person * * * shall be deprived * * * of property, without due process of law; nor shall private property be taken for public use, without just compensation."

GENERAL JURISDICTION OF DISTRICT COURT, TITLE 11, SEC. 306 D.C. CODE (1951 EDITION):

"Said court * * * shall have cognizance of * * * all cases in law and equity between parties, both or either of which shall be resident or be found within said district * * *."

The District of Columbia Housing Redevelopment Act is reported under Title 5, Chapter 7, Section 701 et seq. of the District of Columbia Code (1951 edition).

The condemnation procedure referred to in that Act is reported in Title 16, Section 619 et seq. of the District of Columbia Code (1951 edition).

The pertinent parts of the Federal Tort Claims Act are reported in Title 28, Sections 1346(b), 2671, 2674, 2679, and 2680 of the United States Code.

The pertinent excerpts from the three above-mentioned Acts are lengthy and are therefore appended as Appendix II.

FEDERAL RULES OF CIVIL PROCEDURE

Amendments to Pleadings

Rule 15(a):

"* * * leave [to amend] shall be freely given when justice so requires * * *."

Interrogatories to Parties

Rule 33:

"Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. * * * The interrogatories shall be answered separately and fully in writing under oath * * *."

STATEMENT OF THE CASE

These are appeals from judgments of the District Court of the United States for the District of Columbia, dismissing two complainants for lack of jurisdiction (J.A. 8, 14).

One of the complaints sued the District of Columbia Redevelopment Land Agency and one sued the United States. The plaintiffs in each complaint were the same. The same cause of action was stated in each complaint. The complaint against the United States was because of the actions of the Agency as agent of the United States (J.A. 10).

The Complaints make the following allegations:

1. The Agency is a corporation organized by the District of Columbia Housing Redevelopment Act, chapter 7 of the District of Columbia Code (J.A. 2, 10). This Act creates the Agency to carry out a policy of protecting the citizens of the District of Columbia by eliminating blighted areas and admonishes it to proceed vigorously and without delay (J.A. 2, 10).

2. The Act also gives the Agency the power to acquire real property by purchase or condemnation. The method prescribed is: To promulgate a redevelopment plan of project areas; the adoption by the National Capital Park & Planning Commission of boundaries of the project areas proposed; and approval of the boundaries by the Board of Commissioners of the District of Columbia. After certification of a plan to the Agency by the Planning Commission the Agency "shall" acquire the property by purchase or condemnation (J.A. 2, 3, 10, 11).

3. The condemnation procedure prescribed includes: The filing of a declaration of taking when or after the petition for condemnation is filed, whereupon title to the prop-

erty vests in the Agency; the valuation of the property as of the date of filing of the declaration of taking; and a requirement that the condemnation jury view the land (J.A. 3, 11).

4. On dates unknown to the plaintiff project area redevelopment plans for Areas A, B and C, etc. in Southwest Washington were certified to the Agency (J.A. 3, 11).

5. Mr. Goddard, the plaintiff, and his daughter, Mrs. Love, are the owners or former owners of six lots improved by buildings in those areas (J.A. 3, 11).

6. Mr. Mills and his two sons were the owners of a lot improved by a building in the area. They were tenants of another building next door. They had established a laundromat business known as Mills Laundromat in the buildings (J.A. 3, 11).

7. The complaint against the Agency said that the Mills' sons had assigned their claims against the Agency to their father (J.A. 4). The sons were parties plaintiffs to the complaint against the United States (J.A. 11).

8. In 1956 employees of the Agency told Mr. Mills that the Agency's operations in the area would help his laundromat business. Relying on these representations he improved his properties and borrowed money secured by a deed of trust on one of them to do so (J.A. 4, 12).

9. In spite of these representations the Agency:

I. "Negligently took proceedings which resulted in the increase of the blighting factors in the areas and the decrease of the business of Mills Laundromat."

II. "Unduly delayed the institution and prosecution of condemnation proceedings for the acquisition of the real properties described above."

III. "Knew or should have known that those delays and procedures would result in the increase of those blighting factors and caused those delays and took

those proceedings for the purpose of acquiring plaintiffs' real property and the other real properties in the areas for a price less than the just compensation provided for in the Fifth Amendment of the Constitution of the United States" (J.A. 4, 12).

10. As a result of the Agency's actions and failures to act the following occurred:

I. The entire neighborhood in which plaintiffs' properties were located and the property in that neighborhood deteriorated in appearance and value.

II. Owners were unable to sell property, keep tenants, or protect their property from vandals.

III. Extensive vandalization occurred.

IV. Mr. Goddard and Mrs. Love lost income and occurred other losses to their properties totalling some $37,000.00.

V. Mr. Mills lost his laundromat business and his property all to his damage amounting to $65,000.00 (J.A. 4, 5, 12, 13).

11. The complaint against the United States alleged hypothetically that the Agency is a Federal Agency and its employees at the times complained of were employees of the United States acting within the scope of their employment (J.A. 10).

12. That complaint also alleged that plaintiffs' claims were presented to the Agency and either finally rejected or withdrawn from consideration (J.A. 13).

With the complaint in the Agency case was filed Interrogatories Under Rule 33 (J.A. 5). These interrogatories were never answered.

Motion to dismiss the Agency complaint for lack of jurisdiction was granted, plaintiffs moved to amend, that motion was denied and the Complaint was dismissed (J.A. 8).

Motion to dismiss the complaint against the United States for lack of jurisdiction was granted (J.A. 14).

Appeals followed (J.A. 8, 14) and were consolidated.

The Court of Appeals affirmed (Appendix I).

BASIS FOR FEDERAL JURISDICTION OF DISTRICT COURT

Claim against the Agency:

Statute giving general jurisdiction to the District Court, supra, p. 5.

T. 5, Sec. 70(b), D.C. Code, infra, p. 41, giving the Agency the power to deal in real estate and to sue and be sued.

Claim against the United States:

Federal Tort Claims Act, T. 28, Sec. 1346 U.S. (b), U.S. Code, infra, p. 45.

REASONS FOR GRANTING THE WRIT

I. The decisions below upheld the power of governmentally created corporations to use constitutional procedures in an unconstitutional manner with immunity from review by the Courts. Unless checked by this Court, such corporations and their thousands of employees will turn our Democracy into a Tyranny and destroy our constitutional safeguards by indirect and subtle methods.

II. This case presents an opportunity to decrease the widespread delays current generally in Government, at least to the extent that delay is being used as a weapon against property-owners.

III. The so-called slum clearance program is widespread, and it is of national importance to check its use as an excuse to deprive the property-owner of his rights.

IV. This case involves important questions regarding interpretation of the due-process and just-compensation clauses of the Constitution, the Federal Torts Claims Act,

the Federal Housing Redevelopment Act, and the Federal Rules of Civil Procedure.

V. The decisions of the Courts below conflict with the decisions of this Court and of Federal Circuit Courts of Appeal.

VI. This case is an opportunity to contribute to the movement to abolish injustices in the doctrine of sovereign immunity.

VII. The Housing Redevelopment Program involves the taking of the homes of thousands of small property owners who cannot afford extensive litigation. This case presents an opportunity to curtail the use of the unlimited resources of the Government to take advantage of the inability of the small property owner to protect his rights.

SUMMARY OF ARGUMENT

The District of Columbia Redevelopment Land Agency was created for the purpose of eliminating blighting factors in the District of Columbia. When it deliberately misrepresented and delayed and took other procedures to increase those blighting factors in order to acquire plaintiffs' property for less than just compensation it committed an actionable tort and violated both the due process and just compensation clauses of the Constitution.

Consent to sue the Agency for this tort was granted by giving it the right to sue and be sued and deal in real estate in the act of its incorporation.

The action against the Agency should not have been dismissed for lack of jurisdiction because under the provisions of Sec. 2679 of the Tort Claims Act, T. 28, 2679 U.S. Code. That section only applies to prohibit actions against government agencies "cognizable" under the Act and sec. 2680 provides that the Act does not apply to claims based upon the abuse of discretionary functions and duties, nor to claims arising out of misrepresentation or deceit. The Court,

by dismissing, held in substance that plaintiffs' claims did not involve the abuse of discretionary functions.

On the other hand, in dismissing the action against the United States under the Federal Tort Claims Act the Court held that the claims *did* involve discretionary and not ministerial functions. At least one of these dismissals was wrong.

Actually, the claims involve both ministerial and discretionary functions and both actions should go to trial.

The Supreme Court has now held that discretionary tortious actions at an operational level give rise to an action against the United States.

Under the Federal Rules of Civil Procedure plaintiffs were entitled to discovery. They filed interrogatories to obtain this right. The time for answering expired but they were never answered. The Complaint that was dismissed was the original complaint filed in the cause. The Court should have required answers to the interrogatories and granted plaintiffs' motion to amend in the light of those answers.

Sec. 2679 did not authorize the dismissal of the case against the Agency for an additional reason: The Agency is not primarily a "federal agency"; it is primarily an agency of the District of Columbia or a Municipal Corporation. As such, it was liable for its proprietary torts and these torts were proprietary. In the light of changed conditions it should be held liable whether the torts involved proprietary or governmental functions.

Our forefathers did not enact the Constitution with the idea that government employees could deliberately violate its provisions and thumb their noses at those injured by those violations. This Agency was set up as a semi-business corporation given the dangerous power to acquire property by force. It was sworn to uphold the Constitution. When

it violated the bible of its existence by subtly proceeding to acquire property for half of its value it became liable to the plaintiffs whose business it ruined and whose property it damaged.

ARGUMENT

I. The Complaints Allege Tortious Acts Violating The Constitution and State Good Causes Of Action.

The Agency Corporation was organized in 1946 by Act of Congress set forth in T. 5, Chap. 7, secs. 701 et seq., D.C. Code (1951 edition) for the avowed purpose of protecting the welfare of the citizens of the District of Columbia by eliminating blighted areas by all means appropriate. The Agency was admonished to proceed vigorously without delay.

Sec. 703(b) gives the Agency the power to acquire property by condemning property. The Act makes it mandatory that real estate in a project area be either purchased or condemned after the boundaries of the area have been certified. The property condemned must be valued as of the date the Declaration of Taking is filed in the condemnation proceedings. The property must be viewed by the jury. After adoption of a redevelopment plan no one may build or improve or remodel. Since the properties dealt with are in "blighted" areas they are small properties of comparatively small value.

This combination of circumstances and powers gives the Agency the opportunity of executing an extraordinarily profitable coup by the simple expedient of delaying the condemnation proceedings they were required to bring until the property owners are forced to sell at half value or until the properties were so wrecked by vandalism that the condemnation jury could not help but be influenced to give less than fair value.

The complaints charge that despite the duty of this Agency to uphold the Constitutional provisions requiring

due process and fair value and despite representations made to Mr. Mills that the Agency's operations in his area would help his laundromat business, it negligently took proceedings which increased the blighting factors in the neighborhood and decreased the business of Mills Laundromat; and unduly delayed the condemnation proceedings they were required to bring. This was knowingly done to acquire the properties at less than the fair value insured by the Fifth Amendment. These actions resulted in extensive vandalism, deterioration in appearance and value, loss of tenants and the loss of the entire business of Mills Laundromat.

Under modern practice the complaint is not designed to be a measure of rights of plaintiff as declarations were in the old days. It is for the primary purpose of giving defendants notice of the plaintiff's cause of action.

The question is whether the allegations when taken as true constitute ground for relief under any set of facts that could be proved to support their claims:

> *Dollar v. Land*, 154 F. (2d) 307, 81 U.S. App. D.C. 28, Aff. 67 S. Ct. 1009, 330 U.S. 731, 91 L. Ed. 1209.

In *Conley v. Gibson* (11/8/57), 355 U.S. 41, 45, 46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, this Court held that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

A condemning corporation is responsible to a landowner for damages suffered through unreasonable delay in condemning property:

> *Friendship Cemetery v. Mayor & City Council of Balto., et al.* (Ct. of Appeals of Md., 1952), 90 A. 2d 695;

Petroli v. Mayor, etc., 166 Md. 431, 171 A. 45, 46;
Leisse v. St. Louis, etc. R.R. Co., 2 Mo. App. 105. Aff. 72 Mo. 561;
Black v. Baltimore, 50 Md. 235, 33 Am. Rep. 320.

If the Government assumes a duty and negligently performs it, a party injured thereby may recover damages from the United States even though the careless performance may have been accompanied by some misrepresentation of fact.

U.S. v. Neustadt, C.A. 4, 8/19/60, 281 F. 2d 596.

It may be true that the Government is not required to proceed oblivious of elements of cost. However, it is also true as held in the case of *Gwathmey v. United States* (5 Cir. 1954), 215 F. 2d 148, that the primary consideration in a condemnation case is the property-owner's Constitutional right to due process and just compensation. In that case the Fifth Circuit set aside a procedure which lumped too many properties and involved too many questions as violative of the due-process clause, saying at p. 156 that as between a procedure which restricts the landowner in order to save time and costs and one which preserves the fundamental rights of due process and just compensation, all reasonable doubt should be resolved in favor of justice.

"Acts generally lawful may become unlawful when done to accomplish an unlawful end," "and a constitutional power cannot be used by way of condition to obtain an unconstitutional result.":

Gomillion v. Lightfoot, Mayor of Tuskogee, Supreme Court 11/14/60, 29 L. W. 4024.

II. The Act Waived Immunity Of The Agency From Tort Actions.

This corporation was launched to engage in business and commercial transactions. Courts have long recognized the difference between the more customary governmental activities and those carried on through the commercial device of a private corporation

Dollar v. Land, Ibid, at 81 U.S. App. D.C., p. 33.

In *Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat. 904, 907, 6 L. Ed. 244, 245, Chief Justice Marshall held that when a government becomes a partner in a trading corporation it divests itself of its sovereign character and takes that of a private citizen; and that by giving the bank the capacity to sue and be sued the State of Georgia "strips itself of its sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character."

Chief Justice Marshall's holding in the *Planters' Bank* case has not been dimmed by time. Modern decisions have made tremendous inroads into the doctrine of sovereign immunity and legislators and judges have universally bowed to the idea of the immorality of a government's dishonoring of its obligations.

In *Nacity Bk. v. Clima*, 340 U.S. 356, 359, 75 S. Ct. 423 426, 99 L. Ed. 389, this Court held in respect to the withering of the doctrine of sovereign immunity that "A steady legislative trend, presumably manifesting a strong social policy, properly makes demand on the judicial process."

Today it is well settled that the sue and be sued clause waives governmental immunity from liability for tort:

Petty v. Tenn.-Mo. Commission, (1959) 359 U.S. 257, 280, 3 L. Ed. 2d 809, 79 S. Ct. 792;

Brady v. Roosevelt, 317 U.S. 575, 580, 87 L. Ed. 477, 63 S. Ct. 428;
Dollar v. Land, Ibid;
Keifer v. R.F.C., 306 U.S. 381, 83 L. Ed. 784, 59 S. Ct. 516.

When the United States conducts business transactions through a corporation it does not possess sovereign immunity unless expressly endowed with it:

R.F.C. v. Meenihan, 312 U.S. 81, 83, 85 L. Ed. 595, 597, 61 S. Ct. 770. (Government corporation liable for costs.)

The corporation sued in the instant action is no less amenable to judicial process than a private enterprise would be:

F.H.A. v. Burr, 309 U.S. 242, 245, 84 L. Ed. 724, 729.

The fact that an officer of the Government is an instrumentality of the sovereign does not forbid a Court from taking jurisdiction over him:

Larson v. Dom. & For. Com. Corp., 337 U.S. 682, 686, 69 S. Ct. 1457, 93 L. Ed. 1628, 1634.

An agent of the Government is liable for his torts even when he acts in the name of the United States and with authority:

Larson v. Dom. Com. Corp., Ibid;
Phila. v. Stimson, 223 U.S. 605, 620, 56 L. Ed. 570, 576, 32 S. Ct. 240;
Belknap v. Schild, 161 U.S. 10, 18, 40 L. Ed. 599, 602, 16 S. Ct. 443;
United States v. Lee, 106 U.S. 196, 213, 221, 27 L. Ed. 171, 179, 182, 1 S. Ct. 240;
Anno.: 11 L. Ed. 506.

The principal of liability of government agents for their torts extends to government corporations:

> *Sloan Shipyards Corp. v. U.S. Shipping Board Emergency Fleet Corporation*, 258 U.S. 549, 567, 66 L. Ed. 762, 42 S. Ct. 386.

and see:

> *Bradley v. Roosevelt S.S. Co.*, 317 U.S. 575, 580;
> *Land v. Dollar*, 330 U.S. 731, 67 S. Ct. 62, 91 L. Ed. 611;
> *Goltra v. Weeks*, 271 U.S. 536, 70 L. Ed. 1075.

In the *Sloan Shipyards* case cited above, this Court reversed the action of District Courts dismissing complaints against the United States Shipping Board Emergency Fleet Corporation charging it with wrongful acts constituting torts and breaches of contract. The Fleet Corporation was organized under the laws of the District of Columbia. The United States was its sole stockholder and had granted it powers of eminent domain. The opinion by Mr. Justice Holmes held the Fleet Corporation liable for its torts even though it was an instrument of the United States and said in part:

> "The sovereign, properly so called, is superior to suit for reasons that often have been explained. But the general rule is that any person with the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court. An instrumentality of government he might be, and for the greatest ends; but the agent, because he is agent, does not cease to be answerable for his acts.
>
> * * * * * *

"The plaintiffs are not suing the United States but the Fleet Corporation; and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name. * * *"

Sec. 2680(h) excludes action under Federal Tort Claims Act for negligent misrepresentation as well as willful misrepresentation:

Nt'l. Mfg. Co. v. U.S., 210 F. 2d 263, 276;
Jones v. U.S. (1953) 207 F. 2d 563, 564.

See:

Hatahley v. United States, (Utah 1956) 351 U.S. 173, 100 L. Ed. 1065, 76 S. Ct. 745;
B. & P. R. Co. v. Fifth Baptist Church, 108 U.S. 317.

III. T. 28, Sec. 2679, U.S. Code Did Not Require Dismissal Of The Action Against The Agency.

That section, a part of the Tort Claims Act, says that the authority of a Federal Agency to sue and be sued shall not authorize suits against it on claims "*cognizable under Sec. 1346(b) of this title.*" Sec. 2680 withdraws from the cognizance of the Tort Claims Act claims based upon the exercise or performance or failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee whether or not the discretion involved be abused. That section also withdraws claims arising out of misrepresentation, deceit, or interference with contract rights.

Under the allegations of the complaint evidence could be introduced of violations of discretionary functions by the Agency. Also the complaints allege misrepresentation to Mills resulting in damage. Under the test prescribed

by the *Conley* and *Dollar* cases, *supra*, the complaint against the Agency should not have been dismissed.

In *Dalehite v. U.S.*, 346 U.S. 15, 35, 97 L. Ed. 1427, 73 S. Ct. 956, reh. den. 346 U.S. 841, 98 L. Ed. 362, 74 S. Ct. 13, reh. den. 346 U.S. 880, 98 L. Ed. 386, 74 S. Ct. 117 reh. den. 347 U.S. 924, 74 S. Ct. 511, 98 L. Ed. 1078, this Court in 1953 in a 4-3 decision held that acts of negligence of government employees came within the "discretionary" exception of the Tort Claims Act.

Later in the *Eastern Airlines*,[1] *Indian Towing*[2] and *Rayonier*[3] cases the minority in *Dalehite* became the majority. This Court held that discretionary acts at the operational level resulted in governmental liability and overruled the *Dalehite* case. The complaint in the instant case undoubtedly charges negligence in the abuse of discretion. No one can intelligently apply the principles of these cases until the evidence is in, and then it will be difficult.

IV. The Complaint Against The United States Should Not Have Been Dismissed.

The complaint against the United States was dismissed for lack of jurisdiction. The ground argued was that the actions charged were discretionary and came within the exception under the *Dalehite* case. The *Dalehite* case, however, was overruled by the case of *Eastern Airlines v. United States*, *supra*, holding that negligence of the operator of the control tower at Washington National Air-

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[1] 95 U.S. App. D.C. 189, 221 F. 2d 62 Aff.
Union Trust Co. v. Eastern Airlines,
350 U.S. 907, 76 S. Ct. 192, 100 L. Ed. 796, mod. 350 U.S. 962, 100 L. Ed. 835, 76 S. Ct. 429, reh. den. 350 U.S. 911, 100 L. Ed. 799, 76 S. Ct. 192.

[2] 350 U.S. 61, 100 L. Ed. 48, 76 S. Ct. 122.

[3] 352 U.S. 315, 1 L. Ed. (2d) 354, 77 S. Ct. 374.

port was at the operational level and the Government was liable therefor under the Tort Claims Act; the case of *Indian Towing Co. v. United States*, *supra*, holding the Government liable for neglect of a lighthouse causing shipwreck; and the case of *Rayonier, Inc. v. United States*, *supra*, holding the Government liable under the Tort Claims Act for forest fire damage caused by negligence of the Forest Service in:

1. Allowing inflammable materials to accumulate on Government land.
2. Failing to prohibit a railroad from running trains through this land and starting spot fires from sparks from its engines.
3. Not properly suppressing the spot fires.
4. Failing to quench and prevent the spread of those fires.

In *Merchants Matrix Co. v. U.S.* (C.C.A. 7, 1958), 259 F. (2d) 747, the Court sustained a finding for plaintiff in an action against the United States under the Tort Claims Act for damages for unlawful interference with its tenancy (except for moving expenses) even though that tenancy had been condemned.

In *American Exchange Bank v. United States* (C.C.A. 7, 1958), 257 F. (2d) 938, the Circuit Court of Appeals reversed the District Court's holding that the United States was not liable for negligence in failing to install a handrail on a post office building, saying that the decision not to install the handrail was a discretionary function but it was at the operational level for which the Government was liable under the holding in the *Indian Towing* case.

In *Fair v. United States* (C.C.A. 5) 234 F. (2d) 288, the Court reversed a decision of the District Court of Texas

dismissing a complaint under the Federal Tort Claims Act for failure to state a cause of action. The complaint alleged that Fair had been shot and killed by a Capt. Haywood, a mental patient; and that the Government's employees were negligent in releasing him and in failing to warn a Miss Cooper who had been threatened by him, of his release. Fair had been employed to guard Miss Cooper. The complaint was dismissed because the alleged negligence involved a discretionary function. The Court of Appeals held that this discretion was at an operating level.

In *Dahlstrom v. U.S.* (C.C.A. 8, 1956) 228 F. (2d) 819, the Court of Appeals reversed a decision by the Minnesota District Court for the United States where a low flying airplane piloted by Government employees had frightened horses causing injury to plaintiff. The Lower Court held that plaintiff was not entitled to recover under the Federal Tort Claims Act because the negligent act had been ordered as a part of a surveying plan and involved a discretionary function with the exception. The Court of Appeals held that the negligence may have been at an operational level for which the Government was liable, citing the *Eastern Airlines* and *Indian Towing* cases.

In *U.S. v. Gray* (10 Cir. 1952) 199 F. (2d) 239, plaintiff, the wife of a soldier, sued under the Federal Tort Claims Act to recover damages for injuries she received when she jumped from a window of a Government hospital, to which she had been confined for treatment for a mental illness. Plaintiff claimed that the failure to maintain a guard over her was negligence. The United States contended that it was discretionary whether a guard should be placed over her and the action was therefore excluded from the Act by Sec. 2680(a). Finding for plaintiff in the

District Court and the C.C.A. affirmed in this respect saying:

> "While it was within the discretion of the managerial authorities at the hospital to determine in the first instance whether suitable facilities were available for the care and treatment of plaintiff having decided that such facilities were available and having admitted her, the Government was not authorized to exercise in an unbridled manner and without due regard for the known facts and circumstances a plain and clear duty or function in respect to her care and treatment, with complete immunity under the Act from liability for negligence in connection therewith * * *"

See *Somerset Seafood Co. v. U.S.*, 193 F. (2d) 631, holding Government liable for negligent marking of wreckage of old battleship Texas in Chesapeake Bay. Marking was discretionary, but once discretion was exercised upon the marking, there was liability for negligence in the marking.

In *Costley v. United States* (5th Cir., 1950), 181 F. 2d 723, a soldier's wife was admitted to a hospital and injured by the negligent injection of a harmful drug thought to be a spinal anaethetic. The District Court dismissed for lack of jurisdiction on the ground that the injection of the drug involved a discretionary function excluded by Sec. 2680(a). The Appellate Court reversed holding that the discretionary function was exercised when they admitted her to the hospital and once having admitted her, the hospital no longer had any discretion to exercise with regard to whether she was to receive careful or negligent treatment. They were under a duty to treat her with the same duty and skill that would be owing to a private person.

See *Oman v. United States* (1949, C.C.A. 10 Utah), 179 F. 2d 738, holding that the refusal to cancel grazing permits

was outside of the exception under consideration, and saying:

> "No government employee is granted the discretion whether he shall induce or incite third persons to interfere with exclusive rights or privileges granted by the United States."

In *Pumphrey v. Manor RE & Trust Co.* (1949, C.C.A. 4 Md.) 176 F. 2d 414, the Government was held liable for the death of a tenant who contracted typhus from rats in the basement of an apartment leased by the Federal Public Housing Authority on the grounds of negligence in failing to take adequate measures to exterminate rats. The Court rejected the discretionary function argument saying that the duty to keep the basement free from rats was not discretionary but absolute.

Negligent performance after discretion has been exercised is not excluded from the Federal Tort Claims Act:

Bullock v. U.S., 133 F. Supp. 885, 889.

A public agency who negligently fails to perform a ministerial act is liable:

Kendall v. Stokes, 44 U.S. 87, 3 (How.) (U.S.) 87, 11 L. Ed. 833.

43 Am. Jur. *Public Officers*, 90 Sec. 278.

V. The Complaints Should Not Have Been Dismissed Without Trial.

The gradual growth of social opinion against sovereign immunity from actions where officers or employees of the Government have wrongfully damaged persons and property has only recently resulted in the flowering represented by the Tort Claims Act and the judicial opinions withering that doctrine.

Under modern practice and while this movement is still in a state of growth, it is error to deprive a claimant of his day in Court by granting a motion to dismiss unless the claim is clearly deficient:

Fair v. United States, 234 F. (2d) 288;
California v. United States, (D.C. Cal. '57) 151 F. Supp. 570.

It will be noted in studying this question that in recent years very few cases under the Tort Claims Act have been dismissed on the pleadings.

VI. Dismissing Both Complaints Was Inconsistent.

Lawyers are allowed to plead hypothetically and in the alternative because they cannot be sure what Judges will do. The Judge's decision, however, is law and theoretically cannot be both black and white.

The complaint against the Agency was dismissed because it did *not* involve a discretionary function. The complaint against the United States was dismissed because it *did* involve a discretionary function.

VII. The Complaints Should Not Have Been Dismissed Without Requiring Answers To The Interrogatories And Granting Leave To Amend In The Light Of Those Answers.

The enlightened view required by the Federal Rules of Civil Procedure is that every litigant's right to a day in Court includes the right of discovery. The former cumbersome procedure of a separate bill for discovery preceding a declaration has been supplanted by the right to interrogatories, inspection of documents and depositions in the very suit in which the complaint is filed. No exception is made for suits against the United States or its Agencies

Discovery rights are more important in such suits than in the average action — private citizens do not have the resources to make investigations into the complexities of governmental action without the aid of the Courts.

It has been traditional in the District of Columbia since long before the Federal Rules to give a plaintiff at least one chance to amend before finally sustaining a demurrer or dismissing a complaint.

The plaintiffs in these actions are complaining of actions by numerous employees of a large agency over a long period of time. They are sure that delays and procedures occurred which seriously damaged their property and wiped out their business. They can only find out who, how, when and why with the aid of the Court. That aid they were entitled to so that justice will be done in these cases. That aid was denied when their complaints were dismissed without even giving them the preliminary discovery rights of answers to their interrogatories and without giving them leave to amend once.

VIII. The Agency Is More An Agency Of The District Of Columbia Or A Municipal Corporation Than A Federal Agency.

The Act creating the Agency confines its activities to the District of Columbia.

T. 5, Sec. 701, 704, D.C. Code (1951 edition).

It is a non-stock corporation composed of five members, two appointed by the President and three (constituting a majority) by the Commissioners of the District of Columbia. One appointee of the President may be an official of the United States, one by the Commissioners, an official of the District of Columbia government. All of the non-official members (constituting a majority) must be 5-year

residents of the District of Columbia employed during that time in a private business or profession in the District:

T. 5, Sec. 703(a) said Code.

These members are also the only directors of the corporation:

T. 5, Sec. 703(b) said Code.

Its activities are to acquire real property, raze, improve, rebuild, manage, sell, and rent:

T. 5, Secs. 703(b), 704(a).

These activities are usually performed by private corporations or individuals.

Congress was legislating locally in creating this corporation, just as it was legislating locally when it created the District of Columbia, a municipal corporation.

IX. As A Municipal Corporation The Agency Is Liable For Neglect Of Its Proprietary Duties.

A municipal corporation is liable in tort in the same manner as a private corporation when it acts in its private or proprietary capacity:

Harris v. District of Columbia, 256 U.S. 650, 65 L. Ed. 1146, 41 S. Ct. 610, 14 A.L.R. 1471;
D.C. v. Woodbury, 136 U.S. 450, 34 L. Ed. 472, 10 S. Ct. 990;
Barnes v. D.C., 91 U.S. 540, 23 L. Ed. 440;
38 Am. Jur. *Municipal Corporations*, Sec. 572, p. 263.

X. The Agency Performs Proprietary Functions.

It is well settled that duties of the District of Columbia to manage the streets therein, owned by the United States, is a proprietary function:

Weightman, Barnes & Booth v. U.S., 100 U.S. App. D.C. 32, 241 F. (2d) 437.

Installation of water mains is a proprietary function:

Scull v. D.C., 102 U.S. App. D.C. 104, 250 F. (2d) 767, cert. den. 356 U.S. 920, 2 L. Ed. 715, 78 S. Ct. 703.

Public market, is a proprietary function:

D.C. v. Green, 96 U.S. App. D.C. 20, 223 F. (2d) 312.

The District of Columbia has no immunity from the negligent operation of the sewerage department:

Booth v. D.C., (1956) 100 U.S. App. D.C. 32, 241 F. (2d) 437;
Koontz v. D.C., (1904) 24 App. D.C. 59.

Operation of a bridge was a corporate rather than a governmental function and the City of Chicago was held liable for tort in that operation:

N. M. Paterson v. City of Chicago, (1959) 176 F Supp. 323.

See

Wilson v. Bittinger, 104 U.S. App. D.C. 403, 406, 262 F. (2d) 714.

XI. The Defense Of Governmental Function Is Obsolete And Dying And Should Be Buried.

See *Scull v. D.C.* Ibid.

It is far more just to spread the damages done by torts of governmental agencies among all the people of the land rather than have them borne by the individual injured. The collective shoulders are stronger than any individual's. The individual may be ruined by such a burden while it is merely an irritation to the group. The logic and justice of the substance of this statement has long been recognized and lately has resulted in a flood of statutory and judicial relief. The proprietary function distinction was conceived to decrease the injustice and unfairness of

the governmental immunity doctrine — as a soporific to the conscience of the Court. It has no boundaries — no logical basis. Its lustiest children have been difference and confusion. The time has come to give full effect to the dictates of conscience and to bury the doctrine of immunity before it results in more and greater injustices.

XII. The Opinion

Is in error in stating that the Plaintiff-Appellants have an adequate remedy in condemnation proceedings, for two reasons:

1. The Mills Plaintiffs have already lost their business and property because of Defendants' actions and have no remedy at all outside of this suit.

2. The condemnation procedure does not afford an adequate remedy because of the actions of Defendants causing deterioration of the property and the prejudice of any Condemnation Jury.

The opinion (pp. 4 and 5) grounds the dismissal of the causes on a grant of discretionary authority as to time of taking by D.C. Code Sec. 16-619 (1951). However, Sec. 5-704(b) of said Code provides that condemnation proceedings by the Agency "shall be conducted in accordance with the *procedural provisions* of Sections 16-619 to 16-644" (emphasis ours), and goes on to say that title "shall be taken in the name of the Agency and proceedings brought in the name of the Agency." The portion of Section 16-619 quoted in the opinion is an enabling part and not a procedural part. The Agency Enabling Act is contained in the Redevelopment Act, T. 5, Chapter 7 of the Code. That Act *requires* the Agency to either purchase or condemn the land when the redevelopment plan has been certified to it, T. 5, Section 705(d), and gives the Agency authority

to sell, lease, and otherwise deal with the real property it acquires, to and with private persons. These features set this case apart from the usual condemnation case. They also make the property owners in a project area, most of whom are small people of little resources, peculiarly vulnerable to manipulations and delays by the Agency. When the project area plan has been certified to the Agency, it becomes certain that such owners will be forced to sell to the Agency or their property will be condemned at an uncertain time.

Not only semi-public corporations, but many semi-private corporations — railroads, utilities, etc. — and even private property owners, are given the right to condemn. This is particularly true in the West. In many States general statutes delegate that right. If those who condemn have carte blanche as to delays, much unjust manipulation is possible.

It is no answer to say that the Jury fixes a fair value in cases such as ours. Not only is the Jury influenced by a view of devastated property, but small property owners are not apt to act in retaining counsel and real estate experts until the condemnation proceeding is actually filed. When those proceedings are preceded by undue delay resulting in deterioration in appearance, the property owners' experts are influenced by that appearance in fixing their valuations.

It is no answer to say that the Jurors can be instructed to disregard the damage done by the pendency of the condemnation proceedings. No language can adequately convey the difference in appearance caused by widespread vandalism. Besides, there is seldom any real estate expert available to the property owner who saw the property before the damage occurred.

XIII. The Discretionary Exemption From Judicial Inquiry Does Not Bar The Action Against The Agency.

Our country is not a totalitarian state but a democracy — a government of checks and balances. One of the most important functions of the judiciary is to uphold the Constitution and check the executive from unconstitutional acts. When the executive exceeds the limits of its constitutional powers it is the sworn duty of the Judiciary to protect a citizen whose rights have been violated.

In *Marbury v. Madison*, 5 U.S. 137, 163, 170, 179, 2 L. Ed. 60, Chief Justice Marshall said (at p. 163):

> "The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."
>
> [Quoting from Blackstone]:
>
> " 'it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.' "
>
> "The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

and at p. 170:

> "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. * * *"

and pp. 179 and 180:

> "From these and many other selections which might be made, it is apparent, that the framers of the Con-

stitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

"Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!"

"* * * If such be the state of things this is worse than solemn mockey. To prescribe, or to take this oath, becomes equally a crime."

In the instant case the Agency, created pursuant to the police power charged with the duty of protecting citizens, reducing blight and seeing that property owners receive just compensation for the property it takes, has misused its powers by taking procedures to increase blighting factors so as to acquire property for less than just compensation, and in this manner has damaged property of the Goddard Plaintiffs and actually destroyed property of the Mills Plaintiffs.

CONCLUSION

The subtlety of a scheme violating constitutional rights should not insure its judicial success. Our forefathers did not intend that the citizen should be without remedy when his constitutional rights had been violated. Yet that would be the result of this litigation if these dismissals are allowed to stand. The Writ should issue.

Respectfully submitted,

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Attorneys for Petitioners.

APPENDIX I

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 15,868

Charles R. Goddard, et al., Appellants,

v.

District of Columbia Redevelopment Land Agency, a corporation, Appellee.

No. 15,869

Charles R. Goddard, et al., Appellants,

v.

United States of America, Appellee.

Appeals from the United States District Court for the District of Columbia

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Decided January 12, 1961

Mr. Daniel Partridge, III, with whom *Mr. Franklin P. Gould* was on the brief, for appellants.

Mr. Robert S. Griswold, Jr., Attorney, Department of Justice, with whom *Messrs. Oliver Gasch*, United States Attorney, *Roger P. Marquis*, Attorney, Department of Justice, and *Mrs. Ellen Lee Park*, Assistant United States Attorney, were on the brief, for appellees.

Before MR. JUSTICE BURTON, retired,* WASHINGTON and BASTIAN, Circuit Judges.

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* Sitting by designation pursuant to Section 294(a), Title 28, U.S. Code.

WASHINGTON, *Circuit Judge:* Plaintiffs-appellants owned certain parcels of real estate in Project Area C in Southwest Washington, now being redeveloped by the District of Columbia Redevelopment Land Agency under statutory authority. See *Donnelly v. D. C. Redevelopment Land Agency*, 106 U.S. App. D.C. 99, 269 F. 2d 546 (1959), cert. denied, 361 U.S. 949 (1960); *Riley v. D. C. Redevelopment Land Agency*, 100 U.S. App. D.C. 360, 246 F. 2d 641 (1957). It appears that as to some of these parcels the Government has reached a settlement with plaintiffs-appellants; as to another parcel compensation was awarded after a jury trial and the resulting judgment has been affirmed by this court, *Parcel 5099 v. D. C. Redevelopment Land Agency*, 107 U.S. App. D.C. 95, 274 F. 2d 753 (1960), and the remaining parcels are the subject of condemnation proceedings awaiting trial.

The appeals now before us are from orders of the District Court dismissing two suits for damages brought by plaintiffs-appellants, one against the Redevelopment Land Agency (No. 15868), and the other against the United States (No. 15869). The suit against the Agency charges that agents of that defendant represented to plaintiff Mills that the Agency's operations in the area would help Mills' laundromat business, and that relying on these representations he made extensive improvements to his property. The complaint further alleges that the Agency thereafter "negligently took proceedings which resulted in the increase of the blighting factors in the areas and the decrease of the business of Mills Laundromat." It also alleges that the Agency "unduly delayed the institution and prosecution of condemnation proceedings for the acquisition of the real properties described above," with a view to obtaining the properties at a lower price.[1] The complaint against the United States was filed some two months later, after the Government had

[1] To quote the complaint:

"9. * * * Defendant knew or should have known that those delays and procedures would result in the increase of those blighting factors and caused those delays and took those proceedings for the purpose of acquiring plaintiffs' real property and

moved to dismiss the suit against the Agency. It is couched in almost identical terms, and alleges that the employees of the Agency — if it be regarded as an agency of the Federal Government — were employees of the United States, acting within the scope of their office or employment.

We think the District Court correctly dismissed both suits. Plaintiffs-appellants are entitled to just compensation under the Fifth Amendment. If they do not receive such compensation in the condemnation proceedings, their remedy is by appeal therein. Assuming the truth of the allegations made in each complaint, these are suits against the United States to which it has not consented. Congress expressly excluded from the coverage of the Federal Tort Claims Act suits based on discretionary actions of Government employees, or arising out of misrepresentation or deceit by such employees.[2] Under the governing stat-

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other real properties in the areas for a price less than the just compensation provided for in the Fifth Amendment of the Constitution of the United States.

"10. As a result of defendant's actions and failures to act the entire neighborhood in which plaintiffs' properties were located and the real property in that neighborhood deteriorated in appearance and value, owners were unable to sell property, were unable to keep tenants, and were unable to protect their property from vandals; and extensive vandalization occurred.

"11. As a result of defendant's actions and failures to act plaintiffs Charles R. Goddard and Janetta H. Goddard Love lost income from their properties and incurred other losses to those properties, all to their damage in the amount of Thirty-Seven Thousand Seven Hundred Twenty-One Dollars ($37,721.00).

"12. As a result of defendant's actions and failures to act the Mills Laundromat business was damaged and ruined and the owners were unable to meet the payments on the loans, or pay the rent and they lost their business, the property they owned and their interest in the property they leased, all to the damage of the plaintiff Joseph H. Mills and his assignors in the amount of Sixty-Five Thousand Dollars ($65,000.00)."

[2] Pertinent portions of the Federal Tort Claims Act, 28 U.S.C. §§1346, 2680 (1958), are as follows:

"§1346. United States as defendant.

* * * * * *

"(b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil

ute, the Agency may acquire property "in the name of the United States by condemnation under judicial process whenever in the opinion of such acquiring authority it is necessary or advantageous to do so." D.C. CODE §16-619 (1951). This is a grant of discretionary authority as to the time of taking. See *United States v. Certain Parcels of Land*, 215 F. 2d 140, 147 (3d Cir. 1954). Alleged abuses of discretion, under the express terms of Section 2680, *supra* note 2, are not to be remedied by suits for damages. And the remaining charges are plainly within the category of misrepresentation or deceit. Cf. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). The suit against the United States is thus barred.

The suit against the Agency is in substance a suit against the United States, and is unconsented. The District of Columbia Redevelopment Land Agency, in spite of its name and its limited area of operation, is a Federal agency within the meaning of the governing statute. 28 U.S.C. §2671, *infra* note 3. Redevelopment of the Nation's capital is "the policy of the United States." D.C. CODE §5-701 (1951); the Agency receives direct appropria-

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actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

"§2680. Exceptions.

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * * * *

"(h) Any claim arising out of * * * misrepresentation, deceit, or interference with contract rights."

tions from the Congress, D.C. CODE §5-715 (1951); and it acquires land "for the use of the United States," D.C. CODE §§5-704(b), 16-619 and 16-644 (1951). See also *Small Business Administration v. McClellan*, U.S. , 29 U.S.L. WEEK 4047 (Dec. 5, 1960). Suits based on torts allegedly committed by the Agency or by its employees acting in an official capacity are maintainable, if at all, under the provisions of the Tort Claims Act, and must name the United States as defendant.[3] The suit against the Agency is barred by the terms of that Act, procedurally and substantively.

For these reasons the orders of the District Court will be affirmed. We need not reach the remaining contentions of the parties.

Affirmed.

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[3] The Tort Claims Act provides in pertinent part:

"§2671. Definitions.

"As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

"'Federal agency' includes the executive departments, and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States

"§2679. Exclusiveness of remedy.

"The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive."

Plaintiffs-appellants say their claims against the Agency were not "cognizable" under Section 1346(b), and hence their suit against it should not have been dismissed. We disagree. Their claims, though barred by the terms of Section 2680, *supra* note 2, were for money damages "for injury or loss of property * * * [allegedly] caused by the negligent or wrongful act or omission of any employee of the government while [allegedly] acting within the scope of his office or employment" and hence were "cognizable" under Section 1346(b). See, generally, S. REP. No. 1400, 79th Cong., 2d Sess. 33-34 (1946).

APPENDIX II

DISTRICT OF COLUMBIA

HOUSING REDEVELOPMENT ACT

(T. 5, Chapter 7 of said Code)

"T. 5, sec. 701. *General purposes.*

"It is hereby declared to be a matter of legislative determination that owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare, and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose; and control by regulatory processes having proved inadequate and insufficient to remedy the evils, it is in the judgment of Congress necessary to acquire property in the District of Columbia by gift, purchase, or the use of eminent domain to effectuate the declared policy by the discontinuance of the use for human habitation in the District of Columbia of substandard dwellings and of buildings in alleys and blighted areas, and thereby to eliminate the substandard housing conditions and the communities in the inhabited alleys and blighted areas in such District; and it is necessary to modernize the planning and development of such portions of such District. The Congress finds that the foregoing cannot be accomplished by the ordinary operations of private enterprise alone without public participation in the planning and in the financing of land assembly for such development; and that for the economic soundness of this redevelopment and the accomplishment of the necessary social and economic benefits, and by reason of the close relationships between the development and uses of any part of an urban area with the development and uses of all

other parts the sound replanning and redevelopment of an obsolescent or obsolescing portion of such District cannot be accomplished unless it be done in the light of comprehensive and coordinated planning of the whole of the territory of the District of Columbia and its environs; and that this comprehensive planning and replanning should proceed vigorously without delay; and to these ends it is necessary to enact the provisions hereinafter set forth; and that the acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan, all as provided in sections 5-701 to 5-719, is hereby declared to be a public use."

* * * * * *

"T. 5, sec. 702. *Definitions.*

"The following terms, whenever used or referred to in sections 5-701 to 5-719, shall, for the purposes of sections 5-701 to 5-719 and unless a different intent clearly appears from the context, be construed as follows:

"(a) The term 'Agency' means the District of Columbia Redevelopment Land Agency established by section 5-703.

"(b) 'District Commissioners' means the Board of Commissioners of the District of Columbia.

"(c) 'Housing' includes housing, dwelling, habitation, and residence.

"(d) 'Housing project' means any low-rent housing (as defined in the United States Housing Act of 1937, U.S.C. title 42, ch. 8), the development or administration of which is assisted by the United States Housing Authority.

"(h) 'Planning Commission' means the National Capital Park and Planning Commission.

* * * * * *

"(j) 'Project area' is an area of such extent and location as may be adopted by the Planning Commission and approved by the District Commissioners after public hearing

as an appropriate unit of redevelopment planning for a redevelopment project separate from the redevelopment projects for other parts of the District of Columbia.

* * * * * *

"(n) 'Redevelopment' means replanning, clearance, redesign, and rebuilding of project areas, including open-space types of uses, such as streets, recreation and other public grounds, and spaces around buildings, as well as buildings, structures, and improvements, but not excluding the continuance of some of the existing buildings or uses in a project area. For the purposes of sections 5-701 to 5-719, 'redevelopment' also includes the replanning, redesign, and original development of undeveloped areas which, by reason of street lay-out, lot lay-out, or other causes, are backward and stagnant and therefore blighted and for which replanning and land assembly are deemed necessary as a condition of sound development.

* * * * * *

"T. 5, sec. 703. *Establishment and Powers of the Agency.*

"(a) The District of Columbia Redevelopment Land Agency is hereby established and shall be composed of five members. Two members shall be appointed by the President and three members shall be appointed by the District Commissioners, subject to confirmation by the Senate. One of the Presidential appointees may be an official of the United States Government; one appointee of the District Commissioners may be an official of the District of Columbia Government. Each nonofficial appointee shall have been a resident of the District of Columbia for at least the five next preceding years, and shall have been engaged or employed during such time in private business or industry, or the private practice of a profession, in the District of Columbia. The terms of members shall be for five years, except that the first appointment of one of the Presidential appointees shall be for three years and the other for five years; one of the first appointments of the District Commissioners shall be for four years, one for two years, and one for one year: Provided, That in the event any member shall cease to hold the official position

held by him at the time of his designation or appointment, such cessation shall be deemed to create a vacancy in his membership on the Agency, such vacancy, as well as all vacancies from other causes, to be filled by designation or appointment by the President or District Commissioners for the unexpired term. The members shall receive no salary as such, but those members who hold no other salaried public position shall be paid a per diem of $20 for each day of service at meetings or on the work of the Agency.

"(b) The said District of Columbia Redevelopment Agency is hereby made a body corporate of perpetual duration, the powers of which shall be vested in and exercised by the board of directors thereof, consisting of the five members thereof appointed as above set forth. It shall have the power to adopt, alter, and use a corporate seal which shall be judicially noticed; to make contracts; to sue and be sued, to complain and defend in its own name in any court of competent jurisdiction, State, Federal, or municipal; to make, deliver, and receive deeds, leases, and other instruments and to take title to real and other property in its own name; to adopt, prescribe, amend, repeal, and enforce by-laws, rules, and regulations for the exercise of its powers under sections 5-701 to 5-719 or governing the manner in which its business may be conducted and the powers granted to it by sections 5-701 to 5-719 may be exercised and enjoyed, including the selection of its chairman and other officers, together with provisions for such committees and the functions thereof as it may deem necessary for facilitation of its work; to protect and enforce any right conferred upon it by sections 5-701 to 5-719, or otherwise acquired, including any lease, sale, or other agreement made by or with it; and in general to exercise all the powers necessary or proper to the performance of its duties and functions under sections 5-701 to 5-719. * * *"

"T. 5, sec. 704. *Power to Acquire and Assemble Real Property.*

"(a) Subject to and in accordance with the procedures, conditions, and other provisions of sections 5-701 to 5-719,

the Agency is hereby granted the power to further the redevelopment of blighted territory in the District of Columbia and the prevention, reduction, or elimination of blighting factors or causes of blight and for that purpose to acquire and assemble real property by purchase, exchange, gift, dedication, or eminent domain, and including the power to rent, maintain, manage, operate, repair, clear, transfer, lease, and sell such real property, but excluding the power to build new structures thereon (other than the improvements mentioned in section 5-706(i) or the power to enlarge, extend or make major structural improvements of existing buildings).

"(b) Condemnation proceedings for the acquisition of real property for said purposes shall be conducted in accordance with the procedural provisions of sections 16-619 to 16-644. The title to properties acquired under sections 5-701 to 5-719 shall be taken by and in the name of the Agency and proceedings for condemnation or other acquisition of property shall be brought by and in the name of the Agency. * * *

"T. 5, sec. 705. *General and Project Area Redevelopment Plans.*

"(b) For the exercise of the powers granted to the Agency by sections 5-701 to 5-719 for the acquisition and disposition of real property for the redevelopment of a project area, the following steps and plans shall be requisite, namely:

(1) Adoption by the Planning Commission of the boundaries of the project area proposed by it, submission of such boundaries to the District Commissioners, and approval thereof by said Commissioners.

* * * * * *

"(d) After a project area redevelopment plant shall have been adopted by the Planning Commission and approved by the District Commissioners, the Planning Commission shall forthwith certify said plan to the Agency, whereupon

said Agency shall proceed to the exercise of the powers granted to it in sections 5-701 to 5-719 for the acquisition and assembly of the real property of the area. Following such certification, no new construction shall be authorized by the District Commissioners in such area, including substantial remodeling or conversion or rebuilding, enlargement or extension or major structural improvements on existing buildings, but not including ordinary maintenance or remodeling or changes necessary to continue the occupancy. * * *"

"T. 5, sec. 706. *Transfer, lease, or sale of real property in project area for public and private uses.*

"(a) After the real property in the project area shall have been assembled by the Agency, the Agency shall have the power to transfer to and shall at a practicable time or times transfer by deeds to the United States or to the District of Columbia, or to the appropriate Federal or District public body, department, or agency, those pieces of real property which, in accordance with the approved project area redevelopment plan, are to be devoted to public uses (other than public housing) falling within the construction or administrative jurisdiction of Federal or District agencies, such as streets and other utilities and works, Federal and District public buildings, public recreational spaces, and schools. The Federal agencies and the public agencies of the District of Columbia are hereby empowered, respectively, to acquire real property from the Agency for the uses respectively specified in the project area plan and to pay for same out of their funds duly appropriated for such acquisition. Excepting for such property as may be transferred by dedication, gift, or exchange, the transferee agency shall pay to the Agency such sum as may be agreed upon or, in the absence of agreement, as may be fixed by the Chief Justice of the District Court of the United States for the District of Columbia.

"(b) The Agency shall have the power to lease or sell the remainder of the project area as an entirety to a de-

development company or to an individual or a partnership. * * *"

"T. 5. sec. 707. *Housing for displaced families.*

* * * * * *

"(b) Families displaced by slum clearance or redevelopment under sections 5-701 to 5-719 shall be given preference as tenants to fill vacancies occurring in housing owned or operated within the District of Columbia by Federal or District of Columbia governmental agencies until appropriate housing is available to such families."

CONDEMNATION PROCEDURE

"T. 16. sec. 628. *Declaration of taking — Contents — Vesting of title and right of compensation — Taking possession.*

"The petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States.

* * * * * *

"Upon the filing of said declaration of taking and of the deposit in the resgistry of the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said land in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so

much thereof as shall have been paid into the registry. No sum so paid into the registry shall be charged with commissions or poundage.

* * * * * * *

"T. 16. sec. 631. *"Jury to view lands — Parties.*

"After being selected, impaneled, and sworn, and before hearing the evidence, the jury shall be taken by the marshal upon the lands to be acquired at a time to be fixed by the court in order to view the said lands. . . ."

"Sec. 16-632 [25: 110c]. *Trial-Measure of compensation.*

"After such view and the jury shall have returned to the court, the trial of said cause shall be proceeded with before the court and jury. * * * If the land to be valued shall have been taken by virtue of a declaration of taking, as provided in sections 16-619 to 16-644, said land shall be valued for the purposes of compensation as of the date of such taking; and if, by act of the owner or other party claiming to be entitled to compensation, the value of the land for the use for which it is to be taken has been diminished, as by cutting trees, excavating, grading, or otherwise altering its physical condition, allowance, if petitioner so elects, shall be made in assessing compensation for such diminution in value. * * *.

FEDERAL TORT CLAIMS ACT

"T. 28. sec. 1346 U.S. Code.

"* * * (b) Subject to the provisions of chapter 171 of this title, the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Sec. 2671. *Definitions.*

"As used in this chapter and sections 1346(b) and 2401 (b) of this title, the term—

'Federal agency' includes the executive departments and independent establishment of the United States, and corporation primarily acting as, intrumentalities or agencies of the United States but does not include any contractor with the United States."

"Sec. 2674. *Liability of United States.*

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, * * *"

"Sec. 2679. *Exclusiveness of remedy.*

"The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive."

* * * * * *

"Sec. 2680. *Exceptions.*

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused.

* * * * * *

"(h) Any claim arising out of * * * misrepresentation, deceit, or interference with contract rights."

No. 816

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES R. GODDARD, ET AL., PETITIONERS

v.

DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY AND THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY AND THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The district court did not write an opinion. The opinion of the court of appeals (Pet. App. 33–37) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1961. The petition for a writ of certiorari was filed on March 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an owner of land can recover in a proceeding based on tort against the District of Columbia

Redevelopment Land Agency and the United States for alleged misrepresentations and delays in condemnation proceedings or is limited to recovery for the fair value of his rights in the condemnation proceedings.

STATUTES INVOLVED

Pertinent portions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2679, 2680 (a) and (h), are set out in the appendix to the petition, pp. 45–46.

STATEMENT

The petitioners severally owned six parcels of land within Project Area C under the Southwest Redevelopment plan in the District of Columbia. Petitioner Mills, in addition to a parcel owned by him, also owned a laundromat business situated upon one of the other parcels. As to one of the properties owned by petitioner Goddard, just compensation was awarded as a result of a jury trial and the judgment was affirmed by the court of appeals. *Parcel 5099* v. *District of Columbia, Redevelopment Land Agency*, 274 F. 2d 753 (C.A. D.C.). Of the other five parcels one was purchased outright, the compensation for three was settled after condemnation proceedings were commenced, and proceedings to establish just compensation for the remaining parcel are now pending in the district court.

In February, 1960, the petitioners filed a Complaint for Damages for Tortious Action against the District of Columbia Redevelopment Land Agency (hereinafter referred to as "R.L.A."). The complaint sets forth two causes of action alleging that officials of R.L.A. misrepresented to petitioner Mills, in or about

1956, "that the defendant's [R.L.A.'s] operations in the area would help the Mills Laundromat business." In the second cause of action, the petitioners alleged that R.L.A. "unduly delayed the institution and prosecution of condemnation proceedings for the acquisition" of properties owned by the petitioners. The result, the complaint alleged, was that the Agency acquired the properties at a price less than the just compensation provided in the Fifth Amendment. Damages were sought totaling $102,721. In April, 1960, a complaint based on identical claims was filed against the United States.

The United States Attorney, appearing for both the United States and R.L.A., moved to dismiss both complaints for lack of jurisdiction and failure to state a claim upon which relief could be granted. Each case was dismissed for lack of jurisdiction by a different judge of the district court. The court of appeals affirmed the dismissals and this petition followed.

ARGUMENT

The functions and powers of R.L.A. were before this Court in *Berman* v. *Parker*, 348 U.S. 26. The Agency was established by Congress (D.C. Code (1951), 5–701, *et seq.*) to eliminate substandard housing conditions and blighted areas in Washington, D.C., and to further the redevelopment of blighted territory in the District of Columbia by acquiring real property in its own name by purchase and condemnation. Pursuant to this objective, procedures were set forth in the statute which provided for the preparation and adoption by the proper authorities of a comprehensive

redevelopment plan. The Act provided that after formal adoption of such a plan and forwarding of certification to the Agency, R.L.A. "shall proceed" to acquire the lands involved. Upon such certification the statute provided, also, that no new construction was to be authorized and no substantial remodeling beyond ordinary maintenance undertaken.

1. The waiver of immunity in the Tort Claims Act, 28 U.S.C. 2671, *et seq.*, excepts claims for negligent performance of a discretionary function (28 U.S.C. 2680(a)) where the discretion is on a "planning," as opposed to an "operational," level. *Dalehite* v. *United States,* 346 U.S. 15; *Indian Towing Co.* v. *United States,* 350 U.S. 61. The selection of properties for a redevelopment project and the time for their condemnation is discretionary action within the meaning of this Court's interpretation of the Tort Claims Act. As for the alleged misrepresentation, claims on that basis are also specifically excepted from the Act: 28 U.S.C. 2680(h). The decision of the court below is, therefore, in accord with established principles of law.

Nor may the petitioners proceed independently against the Agency under the "sue and be sued" clause contained in its statutory charter. Section 2679 of the Tort Claims Act provides that the exclusive remedy for actions based on torts of agencies of the United States, or their employees within the scope of their official duties, shall be brought under the Act against the United States. The fact that the petitioners' specific causes of action are excepted from the remedies provided by the Act does not mean that Congress intended to authorize a claimant to

proceed directly against the agency when it is not permitted to do so against the United States. *Wickman* v. *Inland Waterways Corp.*, 78 F. Supp. 284, 285–287 (D. Minn.).[1]

2. The petitioners have not been denied their right to just compensation under the Fifth Amendment to the Constitution. Of the six parcels involved in this case, valuation of at least one of the parcels has been fixed in condemnation proceedings for the specific purpose of establishing just compensation. An appeal was taken by the owner, petitioner Goddard in this case, to the United States Court of Appeals for the District of Columbia Circuit. *Parcel 5099* v. *District of Columbia, Redevelopment Land Agency*, 274 F. 2d 753. In that appeal, petitioner Goddard presented for the court's consideration the following question, among others:

> 4. Did the delays between the announcement of the taking of appellant's property for the Slum Clearance project involved and the viewing of the property by the condemnation jury, when considered with the mandatory provisions of the slum clearance act and the damage done by the taking, result in a violation of the due process and just compensation provisions of the Constitution?

The basic question presented to the court of appeals in the present case is virtually identical:

[1] The decision of the court below that R.L.A. is a federal agency and therefore covered by the Tort Claims Act is based on a reasonable construction of the statute (D.C. Code (1951) 5-701) including the specific provision that redevelopment of the nation's capital is "the policy of the United States." This is in accord with this Court's decision in *Berman* v. *Parker*, 348 U.S. 26.

1. Did the actions of the District of Columbia Redevelopment Land Agency violate the Fifth Amendment to the Constitution of the United States?

* * * *

11. Where there is such undue delay is there a violation of the due process clause of the Constitution?

The sole objective of the earlier proceeding was to establish just compensation. It is *res judicata* of the rights he now asserts in the attempt to transform the action into a suit sounding in tort. Moreover, it demonstrates, as well, that condemnation is the proper remedy for all the petitioners here and is the exclusive remedy to establish just compensation for the taking of their properties.

The extent of the duty owed the petitioners by the United States is the payment of just compensation for the taking of their property. That duty is discharged in the condemnation proceeding. Nothing more could be served by a suit for negligence in a tort action seeking the identical relief.

CONCLUSION

The ruling below is correct. There is no conflict or question calling for review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

QUESTIONS PRESENTED

The question framed in the Respondents' brief, p. 1, erroneously implies:

1. That the delays complained of were limited to delays in condemnation proceedings themselves, whereas those delays included undue delays in performing the duty of instituting the proceedings.

2. That Petitioners' complaints were limited to misrepresentations and delays in condemnation proceedings, whereas the admitted allegations of the complaints were to the effect that Defendants not only delayed for the purpose of acquiring the property for less than fair value, but took other proceedings for that same purpose.

3. That Petitioners have an adequate remedy to recover the full value of the damaged property in condemnation proceedings, whereas this proceeding is Petitioners' only hope for justice.

The first paragraph of Respondents' Statement on page 2 is incorrect of record and in fact. Petitioners Mills have lost their property because of the actions complained of, and no condemnation proceeding can repay them. Although it is not a matter of record in this case, Petitioner Goddard was awarded some compensation for one property in the case mentioned in the brief. However, that property was valued in those proceedings *as of the date of the filing of the Declaration of Taking in the condemnation proceeding*. The damage complained of occurred before this date and reduced the amount received to a figure way below the price he actually paid for the property. It is true that the compensation for two of Goddard's properties, the Fourth Street properties, were settled by stipulation filed in the proceeding to condemn those two properties; and that this stipulation provided that the settlement included the damage to those two properties complained of in these cases. However, the stipulation expressly provided that the settlement did not affect Goddard's claims regarding any other properties, nor the Mills' claims. Although not of record, the statement that one of the properties was pur-

chased is true, but that property was sold in the damaged condition caused by the actions of Defendants, and Goddard has not been compensated for that damage. Petitioners Goddard and Mrs. Love cannot receive just compensation in the condemnation proceedings pending because the statute makes it mandatory that the Jury view the properties in their devastated condition; and that the property be valued as of the date of filing of the Declaration of Taking.

It is true that this Court in *Berman v. Parker*, 348 U.S. 26, held that administrative decisions as to the area and property to be taken were not reviewable. However, this Court contemplated that the rights of property owners to just compensation would be preserved as is indicated by the following language at p. 36 of that Opinion:

> "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of taking."

Sec. 2679 of the Tort Claims Act is limited by its express language to claims cognizable under that Act. It withdraws the "sue and be sued" clause as to those claims only and none other.

The failure of Goddard's appeal in the condemnation case reported in 274 F. 2d 753, cited at p. 5 et seq. of Respondents' brief, affirms the fact that the remedy to correct the abuses of the employees of the Agency does not lie in the condemnation cases. One of Goddard's contentions in that case was that the property should have been valued as of a date before the damage done by the Agency's undue delays and other proceedings had reduced the value of the property. The Court of Appeals affirmed in a *per curiam* decision without opinion.

CONCLUSION

The property owners in these "slum clearance" programs are not getting fair value for their property. Cloaked beneath the constructive nature and popularity of the program, those intrusted with its enactment are trampling on the rights of thousands. Only this Court can right the wrongs done these people, and we appeal to this Court to do so.

Respectfully submitted,

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